No. 06-48

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In The
Supreme Court of the United States

SOO KYANG KIM,

Petitioner,

v.

ALBERTO R. GONZALES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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Questions Presented

I. WHETHER INEFFECTIVE COUNSEL CAN CONSTITUTE EXTRAORDINARY CIRCUMSTANCES, GIVEN THE VARIOUS CONFLICTING GUIDELINES BY CIRCUIT COURT DECISIONS, AND AS SUCH ARE GROUNDS FOR REOPENING REMOVAL PROCEEDINGS UNDER THE IMMIGRATION AND NATIONALITY ACT, SECTION 240(b)(5)(C) OF 8 U.S.C.A. 1229(b)(5)(C).

WHETHER PETITIONER'S LACK OF NOTICE IS SUFFICIENT REASON TO REOPEN REMOVAL PROCEEDINGS, UNDER 8 U.S.C.A. 1229(b)(5)(C), OR IT VIOLATES HER DUE PROCESS RIGHTS UNDER THE 5TH AMDENDMENT

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Opinions Below

On April 22, 2003, the immigration judge ordered the Petitioner removed *in absentia* for failure to appear at the hearing for removal. On May 21, 2003, the present attorney filed a motion to reopen with the immigration court in Baltimore, Maryland based on the grounds that exceptional circumstances existed. The motion to reopen was denied by the immigration court on March 15, 2004. On April 12, 2004, present attorney filed an appeal on order to deny the motion to reopen, based on exceptional circumstances that existed and a lack of rational basis for the denial order. The appeal was denied on April 22, 2005. Petitioner sought review with the 4th Circuit Court of Appeals; the Petition for Review was denied in an unpublished opinion on December 30, 2005.

Jurisdiction

A timely Petition for Review was denied by the United States Court of Appeals on December 30, 2005. (App. 2) An extension of time to file the Petition for Writ of Certiorari was granted to and including July 10, 2006, on May 11, 2006, in application No. USAP 05-1546. The jurisdiction of the Court invoked under 28 U.S.C. section 1254(1).

Constitutional and Statutory Provisions Involved

8 U.S.C. § 1252

8 U.S.C. § 1229

8 C.F.R. § 1103.3

8 C.F.R. § 1003.26

8 C.F.R. § 292.5

U.S. Constitution, 5th Amendment

Statement of the Case

Petitioner, SOO KYANG KIM, is a native and citizen of South Korea. She entered the United States in Chicago, Illinois on or about November 13, 2001 on a non-immigrant visitor Visa. Soon after entering the United States on her visa, she met an American citizen by the name of Brandon Lee. A short time later, in 2002, Petitioner and Mr. Lee were married. On May 8, 2002, the government began removal proceedings against Petitioner. The initial notice to appear was served personally on Petitioner.

The first hearing was scheduled for May 21, 2002 and held at the immigration court in York, Pennsylvania. Petitioner dutifully appeared at this hearing even though she was given a mere five days notice. Subsequent hearings were also held at the immigration court located in Baltimore, Maryland.

In total, four hearings were held on September 10, 2002, November 26, 2002, March 18, 2003 and April 22, 2003. All notices for these hearings were sent to Petitioner's attorney Dusic Kwak. Petitioner appeared at every hearing prior to the hearing scheduled for April 22, 2003.

When she failed to appear, she was removed *in absentia* on April 22, 2003. Her failure to appear was due to extraordinary circumstances; Petitioner failed to receive notice of her request for appearance. Petitioner's attorney informed Petitioner and her husband that an appeal was pending with the Board of Immigration Appeals regarding the denial of an I-130 appeal (That appeal was filed on February 10, 2003, prior to the hearing scheduled in the immigration court in Baltimore, Maryland). Petitioner and her husband understood from Mr. Kwak that because an appeal was pending, the Petitioner did no have to appear in court until the appeal was decided. Therefore, It was not necessary to appear in court on April 22, 2003. Petitioner's attorney, Mr. Kwak, never informed Petitioner of the notice to appear at that hearing, nor did he clarify the necessity to appear, regardless of the appeal on the I-130 issue. (see App. pp. 27 & 18) Had Petitioner understood that the information from her attorney was incorrect, she would have appeared at the hearing, like she did every prior hearing.

Furthermore, Mr. Kwak did appear at that April 22, 2003 hearing, He made no attempt to contact Petitioner or her Husband any time prior to confirm she would appear. This is not the first time Mr. Kwak mismanaged Petitioner's case. On June

30, 2003, he inappropriately filed a visa petition on behalf of Petitioner, when 8 C.F.R. 1103.3 (a)(1)(iii)(B) dictates that Petitioner must do it herself. Then again, on July 14, 2003, Mr. Kwak inappropriately filed his motion to withdraw as petitioner's Attorney with the Executive Office of Immigration Review; his letter was rejected because the papers should have been filed with the Appeals Board (see App. pp. 15-17). In summary, Mr. Kwak, at that time still Petitioner's representing attorney, was not even aware of the Appeal or the Appeals process. Given the totality of circumstances, even though Petitioner did not allege ineffective counsel, it does not negate the fact that there was indeed ineffective counsel. It should also be noted that petitioner is South Korean, and it is custom to give deference to men of position like an attorney (Mr. Kwak is also South Korean); hence, Petitioner was reluctant to testify to her ineffective counsel.

Upon review of the extraordinary circumstances – lack of notice and infective counsel – Petitioner feels the Board of Immigrations decision to uphold the *in absentia* removal lacked Rational Basis – and violated her Due Process Rights under the 5th Amendment of the United States Constitution.

Reasons for Granting the Writ

I. INEFFECTIVE COUNSEL CAN CONSTITUTE EXTRAORDINARY CIRCUMSTANCES, GIVEN THE VARIOUS CONFLICTING GUIDELINES BY CIRCUIT COURT DECISIONS, AND AS SUCH, ARE GROUNDS FOR REOPENING REMOVAL PROCEEDINGS UNDER THE IMMIGRATION AND NATIONALITY ACT SECTION 240(b)(5)(C), OF 8 U.S.C.A. SECTION 1229(b)(5)(C).

In re Gustavo Alonzo Grijalva-Barrera, I&N Dec. 3284 (BIA 1996), and In re Cecillia Rivera-Claros, I&N Dec. 3296 (BIA 1996), the Board wrote that ineffective counsel can constitute extraordinary circumstances, as defined under the Immigration and Nationality act Section 240(b)(5)(C). This was affirmed again In re N-K & V-S, I&N Dec. 3312 (BIA 1997). All 3 decisions quoted the *Lozada Requirements* – set forth in Matter of Lozada, I&N Dec. 637 (BIA 1988); *aff'd*, 857 F.2d 10 (1st Cir. 1988) – as the standard by which ineffective counsel is tantamount to extraordinary circumstances.

This is more recently re-affirmed in Tang v. Ashcroft, 354 F.3d 1192 (10th Cir 2003), where, in deciding if Mr. Tang met the *Lozada* Requirements, the majority ruled "... that an Attorney's deficient performance can amount to exceptional circumstances under Section 1229a(e)(1) sufficient to reopen removal proceedings pursuant to Section 1229a(b)(5)(C)(i), Mr. Tang's petition fails because he failed to comply with the BIA requirements of

ineffective counsel in Fong Yang Lo." (citing Fong Yang Lo v. Ashcroft, 341 F.3d 934, 936 (9th Cir. 2003).

The First requirement is that (1) the motion – to reopen based on ineffective counsel via extraordinary circumstances - be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard. The Second is that (2) counsel shoes integrity or competence is being impugned by informed of the allegations leveled against him and be given an opportunity to respond. The third is (3) the motion reflect whether a complaint has been filed with the appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not.

With respect to the Third Requirement, the 4th Circuit of Appeals, in Figeroa v. U.S. I&NS, 886 F.2d 76 (4th Cir. 1988) "failed to see how this indicates that ...representation was effective. In Figeroa, the alien spoke no English and had limited education. The Court reasoned that he was "no doubt unaware of any action he might be able to take" against his counsel. "such as filing either a complaint with the state bar or a legal malpractice claim, Id. at 79. This is exactly the same predicament as petitioner here. Mrs. Kim is of limited education and speaks little to no English. She would not be aware of any action she should take against her ineffective counsel.

We agree with the Fourth Circuit, in failing to see how this indicates representation was effective. The facts of the case itself are *prima facie* evidence of ineffective counsel, whether or not a complaint has been reported to the local state bar. As stipulated, Mr. Kwak never properly informed his client Kim of the need to appear at the April 22, 2003 hearing. Prior to this, counsel, on June 30, 2003, inappropriately filed a visa petition on behalf of Kim, when 8 C.F.R. 1103.3(a)(l)(iii)(B) dictates that Petitioner must do it herself (see Appendix p. 136). Then again, on July 14, 2003, Mr. Kwak Inappropriately filed his motion to withdraw as Petitioner's attorney with the Executive Office of Immigration Review; his letter was rejected because the papers should have been filed with the Appeals Board (see App. p. 15-17). In summary, Mr. Kwak, was, at that time, still Petitioner's representing attorney, yet was not even aware of the Appeal or the Appeals process.

With respect to the First Requirement, petitioner did not specifically file a motion alleging ineffective counsel. However, she did submit a sworn affidavit stating her reason for failure to appear – that her counsel was unclear as to whether she had to go to the hearing with the I-130 petition still before the BIA. In Ghounam v. U.S., 378 F.3d 740, 745 (8th Cir. 2004), the Court ruled that the fact that a respondent appeared at all the hearings held prior to the missed hearing that led to an in absentia removal, is sufficient factually information to allow a sworn affidavit from respondent stating her reason for failing to appear. Mrs. Kim fulfilled this requirement. She submitted her affidavit. She had

been present at every hearing before the immigration court prior to the April 22, 2003 one. Therefore, Mrs. Kim's affidavit stating her reason for failure to appear should have been sufficient grounds for the Board to reopen her removal proceedings (see App. p. 18). Their failure to do so is irrational, without sufficiently stated reason, and too conclusory; the Board blindly applied the Lozada Requirements without looking at the totality of the circumstances and facts in this case.

Following the Fourth Circuit's logic in Figeroa, with respect to the Third Requirement, the same logic can be applied to the First: the failure to file a motion specifically alleging ineffective counsel, does not necessarily indicate whether counsel was indeed effective or not. Mrs. Kim spoke little to no English, and was not aware of this necessity Furthermore, as stated, it should also be noted that petitioner is South Korean, and it is custom to give deference to men of position like an attorney (Mr. Kwak is also South Korean); hence, Petitioner was reluctant to testify to her infective counsel as well. Hence, per Ghounam, Mrs. Kim's sworn statement, and *prima facie* evidence that she appeared before all prior hearings before this one in question should have been taken into consideration by the Board, and her removal proceedings reopened.

Finally, with respect to the Second Requirement of Lozada in Denko v. U.S., 351 F.3d 717 (6th Cir. 2003), the court ruled that the immigration judge improperly reasoned that respondent was not entitled to reopen her proceedings solely because she failed to submit an

affidavit from her prior attorney. Again, following the logic of Figeroa, the failure of the submission itself is not necessarily entirely indicative of whether there was ineffective counsel or not. The facts clearly show ineffective counsel. Mrs. Kim spoke little to no English and was not aware of the requirement. Even if she was, or later did become aware, Korean custom would inhibit her alleging ineffective counsel – and notifying her previous counsel of such. Given the totality of circumstances, the Board should have taken this into consideration in their ruling.

In Fong Yang v. Ashcroft, that majority went on to say "Several circuits do not require strict compliance with Lozada Requirements", Id. at 937, 938. The Court discussed the necessity of flexibility in *Lozada* analysis to ensure proper assessment of infective assistance claims, discourage meritless claims, and hold Attorneys to appropriate standards of performance, Id. at 937 N.4)

In Xu Yong Lu, 259 F.3d 127 (3rd Cir. 2001), the Court warned against the dangers of applying *Lozada* too strictly, Id at 133. This Court also echoed similar sentiments in Figeroa v. U.S. I&NS, 886 F.2d 76 (4th Cir. 1988) (see Petitioners Brief, App. p. 10, finding whether or not a complaint has been filed against poor counsel with appropriate disciplinary authorities "fails to see how this indicates that...representation was effective.")

Furthermore, in Singh v. INS, 213 F.3d 1050, 1052 (9th Cir. 2000), the court said one must look to the "particularized facts present in each case" in determining whether petitioner has established

exceptional circumstances. In Contra Singh v. INS, 295 F.3d 1037, 1040 (9th Cir. 2002), the Court found petitioner Singh had "diligently appeared for all previous hearings", and "had no reason to delay the hearing after the culmination of years of efforts to obtain permanent status". The Court went on to rule that Singh's misunderstanding of the time of the hearing constituted exceptional circumstances, based on the prima facie evidence of the case (e.g. – attended every hearing prior).

The same spirit of these cases guide here. Petitioner Kim has met the requirements of *Lozada* (see Petitioner's Brief, App. pp. 10-14). She had attended all previous hearings before the missed hearing on April 22, 2003, dating back one year. She submitted the proper affidavit explaining her reason why she failed to appear (see Ghounam v. U.S., 378 F.3d 740, 745 (8th Cir. 2004), where the Court ruled where a respondent appears at every prior hearing, it's factually sufficient to allow a sworn affidavit stating reason for failing to appear. See also Petitioner's Brief, App. pp. 10-14 and App. pp. 18-19). She had too much to lose by failing to appear for the hearing, and after a culmination of one years worth of hearings, would simply not just show up for one. If not for the bad advice of her counsel, Mrs. Kim would have appeared for the April 22, 2003 hearing. The Court echoed this sentiment in Romano-Morales v. INS, 25 F.3d 125, 129 (2d Cir. 1994), where the Court ruled an Alien's good faith reliance on counsel...could contribute to a finding that extraordinary circumstances exists.

The *Romano* Court went on to state that Rules regarding in Absentia hearings should be carefully applied to avoid conflict with statutory or constitutional rights, Id. at 129. Hence, while there may be a desire in "bringing litigation to a close" and avoid delays, where "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States", these rulings here are to ensure basic rights are not infringed in the name of quick justice. Romano-Morales v. INS, 25 F.3d 125, 129 (2d Cir. 1994). The Court in Sharma v. INS, 89 F.3d 545 (9th Cir. 1996) agreed abuse of discretion by the BIA is a proper standard of review. In re S-A-, 21 I&N Dec. 1050 (BIA 1997), Board Member Lory Rosenberg went on to say, "Although it may appear that I am being facetious or positing an absurd extreme in some of the extrapolates I have made concerning the quality and quantity of evidence one should anticipate will be required by majority to reopen a removal conducted in absentia, ... I am deadly serious. The right to a hearing and an opportunity to be heard is among the most precious rights enjoyed in a democracy such as ours. It should not be sacrificed inadvertently because of lack of Representation, *poor Representation*, or underestimation of the requirements necessary to secure such a right, *Id* at 1057.

Petitioner Kim would have attended the hearing. She is an average layperson who speaks little English. It is not unreasonable to believe she would follow her Attorney's advice in whether to attend the hearing or not. Furthermore, Both her counsel and Mrs. Kim are of Korean descent, so there was a greater trust to believe what her counsel

had to say. Her counsel's confusion over the hearing, and the whole appeals process, constitutes ineffective counsel given the totality of the circumstances particularized in this case.

In addition to the Lozada Requirements, the Board in N-K & V-S stipulated that if ineffective counsel was so fundamentally unfair that the alien was prevented from reasonably presenting his case, it is considered a denial of Due Process. Id. at 880. The alien must also show that she was prejudiced by her representative's performance. Matter of Lozada, supra at 638. This is obvious in the present case: if it were not for counsel Mr. Kwak's failure to properly notify his client Mrs. Kim of the hearings, Mrs. Kim would not have been deported in absentia. Mrs. Kim was prevented from reasonably presenting her case to be allowed to stay in the United States, and was prejudiced from doing so by her counsel because she was declared removed *in absentia* due to her failure to show at one of her proceedings to present such case.

II. PETITIONER'S LACK OF NOTICE IS SUFFICIENT REASON TO REOPEN REMOVAL PROCEEDINGS, UNDER 8 U.S.C.A. SECTION 1229(b)(5)(C), AND VIOLATES HER DUE PROCESS RIGHTS UNDER THE 5TH AMENDMENT.

Pursuant to the Immigration and Nationality Act, Section 240(b)(5)(C), an In absentia order of removal may be rescinded only upon a motion to reopen filed within 180 days after the order of removal has been filed – via 8 U.S.C.A. §

1229(b)(5)(C). Petitioner's motion to reopen was timely. In order for the motion to reopen to be successful, the Petitioner must show that their failure to appear occurred because of "exceptional circumstances", or that the alien did not receive notice, was in federal custody or that the failure to appear was through no fault of the alien. Id. The Immigration And Nationality Act Section 240(e)(1) defines "exceptional circumstances" as circumstances that are beyond the control of the alien. 8 U.S.C.A. § 1229(e)(1).

Although 8 C.F.R. § 292.5(a) & § 1003.26(c)(2) state notice to an alien's counsel constitutes notice to the alien, Petitioner argues her previous attorney, Mr. Kwak, did not give her notice that was served upon him for the request to appear for the April 22, 2003 hearing (see also Matter of Baracio, I&N Dec. 255 (BIA 1985)). As stipulated, Petitioner's attorney informed Petitioner and her husband that an appeal was pending with the Board of Immigration Appeals regarding the denial of an I-130 appeal. Petitioner and her husband understood from Mr. Kwak that because an appeal was pending, the Petitioner did not have to appear in court until the appeal was decided. Therefore it was not necessary to appear in court on April 22, 2003. Petitioner's Attorney, Mr. Kwak, never specifically informed Petitioner of the to appear at that hearing, nor did he clarify the necessity to appear, regardless of the appeal on the I-130 issue. According to the transcripts of the Removal hearings prior to April 22, 2003, Mr. Kwak was actually still confused as to whether Petitioner had to appear for further hearings (see appendix pp. 64-90); had Petitioner understood that the

information from her attorney was incorrect, she would have appeared at the hearing, like she did every prior hearing.

In Chete Juarez v. Ashcroft, 376 F.3d 944, the respondent was ordered removed *in absentia* because she failed to appear at a hearing reconsidering an application. Like Petitioner Mrs. Kim, respondent in Chete Juarez had appeared for every scheduled hearing, except the last for which she received no notice.

Furthermore, the court in Chete Juarez even stated "a motion to reopen may be supported by exceptional circumstances even where the petitioner missed her hearing because of unexceptional circumstances, for instance, misunderstanding the scheduled time of her hearing" Id. at 946 In this case, Petitioner was never directly told by Mr. Kwak that she had to appear on April 22, 2003. Mr. Kwak had informed petitioner that the I-130 visa request was still under appeal, and like Chete Juarez, petitioner was not specifically told – and consequently misunderstood her need to appear on April 22, 2003.

Petitioner does not argue that Notice was not properly served on Petitioner's counsel. However, Petitioner does argue that she failed to receive proper notice by her counsel. (see Joint Appendix, pp 118-119). The failure to apprise his client of the need to attend the hearings is one element of a totality of circumstances constituting ineffective counsel, and, as such, violates the 5th Amendment.

In Matter of W-F, 21 I&N Dec. 503 (BIA 1996), the Board cited H.R. conf. Rep. No. 955, 101st Con. 2d Sess. 132 (1990), whom wrote "the conferees expect that in determining whether an alien's failure to appear was justifiable, the Attorney General will look at the totality of the circumstances to determine whether the alien could not reasonably expected to appear."

Petitioner's counsel told her husband they did not have to appear at the April 22, 2003 meeting (in Chete Juarez, and Singh, both courts found exceptional circumstances in misunderstanding hearing times). At that hearing, Counsel told the IJ that "there was every indication they (e.g. – Kim and Husband) would show" (see App. pp. 20-26). However, this is vague at best. Why did counsel not say "I told them to show", or that they "told me they would be here? " That would be more indicative of no misunderstanding. Counsel then went on to explain that he wrote and called Kim to find her whereabouts, but no such letter exists in the record. Kim would not have needed to contact him earlier, because when they spoke it was no emergency; he told them they would not have to appear. After learning of the in Absentia ruling, it was only three weeks later that petitioner found new counsel (without trying to offend previous counsel, and both are Korean and custom dictates deference to men in such positions) and made motion to reopen her proceeding. The fact Kim attended all prior hearings and retained new counsel quickly illustrates prima facie that she would have attended the hearing but for lack of proper notice from her counsel.

While it is true counsel was told in the previous hearing the court would not delay pending the I-130 decision outcome, counsel was still confused about the entire matter. This in itself is not uncommon; in the Matter of M-S-, 22 I&N Dec. 349 (BIA 1998), the board ruled, even though there was oral warning about missing a hearing, like this case, that if a form of relief was unavailable at the time of the Absentia decision, one can have the ruling re-opened. In the present case, at the time of the Removal proceedings and consequential in absentia ruling, the availability of possible Adjustment of Status (e.g. – the I-130 decision) was still pending, and not yet available as a form of relief. Hence, there is a reasonable belief as to why counsel was still confused about whether his client had to attend the April 22, 2003 hearing, but nonetheless, he should have told his client to be at the meeting. Even if Petitioner was told orally in the previous meeting of danger of not attending, her trust in her Korean Attorney, and as a normal layperson with limited English and knowledge of our Court system is ample reason to believe she would trust her attorney's advice.

In Tang v. Ashcroft, 354 F.3d 1192 (10th Cir 2003), the majority cited Osei v. INS, 305 F.3d 1205, 1208, whom wrote "this Court has recognized that the Fifth Amendment guarantees aliens subject to deportation the right to a fundamentally fair proceeding." The majority in Tang went on to say, "Accordingly, Mr. Tang can state a Fifth Amendment violation if he proves retained counsel was ineffective, and, as a result, was denied a fundamentally fair proceeding," Id. at 1195.

Kim was denied a "fundamentally fair proceeding" by her lack of notice because of ineffective counsel. If it were not for her attorney's advice, she would have not been subject to the in Absentia ruling.

Under 8 C.F.R. Section 3, Immigration Judges have discretion in ordering removals in Absentia. A judge can even order mere voluntary departure if documentation is enough to show it's warranted, without respondent even being there (see Matter of W-F). Given the totality of Circumstances in this case (e.g. – Ineffective counsel, lack of notice, prima facie attendance of all previous hearings and subsequent quickness to get new counsel) – and the fact Kim was never a danger to flee, or was she convicted of any serious crime. (She was caught working when all she had was a Visitor's VISA [see Joint Appendix p 9]) - the IJ abused her discretion by blindly ruling for removal in Absentia without looking at the particularized facts of the case.

As stated, petitioner appeared at every hearing prior. Because of lack of notice, petitioner did not appear at the April 22, 2003 hearing, and did not get a chance to adequately represent herself. As a result, petitioner's Due Process Rights were infringed, and the Board's decision should be overturned.

Conclusion

Petitioner SOO KYANG KIM seeks to have the Board of Immigration Appeals decision reversed. The Board's decision lacked sufficient rational basis

and was too conclusory. The alleged ineffective assistance of counsel rises to the level of a due process violation, presents a mixed question of law and fact, and is therefore subject to *de novo* review, U.S. v. McConney, 728 F.2d 1195, 1202-03 (9th Cir. 1984); the facts show Mrs. Kim was a victim of ineffective counsel, and, given the various conflicting circuit court decisions on the matter, meets the applicable extraordinary circumstance under 8 U.S.C. § 1229a(b)(5),240(b)(5) to explain her failure to appear before the April 22, 2003 hearing. As such, she failed to receive proper notice of the hearing, whereby violating her Due Process rights under the 5th Amendment of the U.S. Constitution.

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